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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 17 2007
EAC 04 030 53333

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition and subsequently dismissed a motion to reopen and reconsider filed concurrently with the instant appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a violinist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director noted that it was the petitioner's "claim" to qualify as an alien of exceptional ability but failed to address whether the petitioner, in fact, qualifies for that classification. Rather, the director concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel's sole assertion is that the director erred in finding that the waiver of the alien employment certification process was not in the national interest because performing artists of exceptional ability are classified under Schedule A pursuant to 20 C.F.R. § 656.5.

Counsel is not persuasive for several reasons. First, Schedule A Group II designation as defined by the Department of Labor is not the same inquiry as the national interest waiver of the alien employment certification for aliens of exceptional ability. Congress created the immigrant classification for aliens of exceptional ability. Section 203(b)(2) of the Act. Citizenship and Immigration Services (CIS) defines exceptional ability as a degree of expertise significantly above that ordinarily encountered. 8 C.F.R. § 204.5(k)(2). That regulation then provided six regulatory criteria of which an alien must meet at least three. 8 C.F.R. § 204.5(k)(3)(ii). Congress also provided that the alien employment certification process normally required for this classification *may* be waived in the national interest. Section 203(b)(2)(B)(i). Schedule A, Group II designation, however, is not a waiver of the alien employment certification process but a general certification for occupations for which the Department of Labor has already determined that there are not sufficient United States workers who are able, willing, qualified, and available. 20 C.F.R. § 656.5.

The standards for evaluating whether a waiver of the alien employment certification process is in the national interest are not the standards used to consider whether an alien qualifies for Schedule A, Group II designation. In evaluating national interest waiver requests, CIS considers several factors unrelated to whether or not a shortage exists in the occupation. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 217-18 (Commr. 1998)(hereinafter "NYSDOT"). Alternatively, determinations of eligibility for Schedule A, Group II designation for aliens of exceptional ability are based on the Department of Labor's standard, set forth at 20 C.F.R. § 656.22(d)(as in effect when this petition was filed). That regulation defines aliens with exceptional ability as those with widespread acclaim and international recognition, *id.*, a different standard than the "degree of expertise significantly above that ordinarily encountered" standard set forth at 8 C.F.R. § 204.5(k)(2). The regulation at 20 C.F.R. § 656.22(d)(as in effect when this petition was filed) then sets forth seven criteria, of which an alien

must meet at least two. Thus, even if the director had concluded that the petitioner was an alien of exceptional ability as defined in CIS regulation 8 C.F.R. § 204.5(k)(3)(ii), and he did not, that finding would not mandate a waiver of the alien employment certification process in the national interest waiver pursuant to Schedule A, Group II designation, a different standard. *See also NYSDOT,* 22 I&N Dec. at 222 (exceptional ability, by itself, does not mandate a waiver of the alien employment certification process in the national interest).

In addition, it is not appropriate to raise Schedule A, Group II designation for the first time on appeal. The petition was initially filed seeks a waiver of the alien employment certification process, not Schedule A, Group II designation. As such, the director did not err in considering the waiver request rather than Schedule A, Group II designation. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998).

Moreover, the regulation at 20 C.F.R. § 656.22(d) (as in effect when this petition was filed) provided that "an employer" can seek a labor certification under Schedule A, Group II designation. The instant petition was filed by the alien. An alien cannot seek Schedule A, Group II designation on her own. In fact, even the new regulations regarding Schedule A, Group II designation, 20 C.F.R. §§ 656.5, 656.15(d), require that the employer file a petition seeking that designation.

Finally, the regulation at 20 C.F.R. § 656.10(b) (as in effect when this petition was filed) excludes aliens of exceptional ability in the performing arts from eligibility for Schedule A, Group II designation. If the petitioner believes that she is eligible for Schedule A, Group II designation under the new Department of Labor regulations set forth at 20 C.F.R. § 656.15(d)(2)(pertaining to the performing arts), the appropriate action would be to have *an employer* file a new petition in her behalf seeking that designation. We will not consider eligibility for that designation in this matter although we note that even when an employer seeks Schedule A, Group II designation for an alien, the alien must also qualify for classification as an alien of exceptional ability as defined in CIS regulations, 204.5(k)(3)(ii). As discussed below, while not addressed by the director, we find that the petitioner has not established that she meets CIS's regulatory requirements for aliens of exceptional ability, which have never been addressed by counsel.

While counsel raises no other objections to the director's decision on appeal, we find that more discussion is warranted as to whether the petitioner qualifies for the classification sought and the national interest waiver itself, discussed in little detail in the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

> (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of job offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. Counsel initially asserted that the evidence "amply demonstrates the petitioner's qualifications as a gifted violinist of exceptional ability," but does not explain how the petitioner meets the regulatory requirements for that classification. The director acknowledged that the petitioner must demonstrate exceptional ability but failed to address whether or not the petitioner established eligibility for that classification. We find that whether or not the petitioner qualifies for the classification sought is a fundamental issue in this matter and must be addressed. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, in order to serve as evidence to meet this criterion, a degree must be indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner indicated on the Form ETA 750B that she had studied violin at the Curtis Institute of Music, Yale University and the New England Conservatory of Music. She does not list any degrees

or certificates received and the record lacks copies of diplomas or official transcripts. Thus, the petitioner has not established that she meets this criterion.

*Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought*

While the petitioner has been playing the violin since childhood, the record lacks evidence of full-time employment in this field. In fact, the petitioner was in the United States pursuant to a nonimmigrant student visa when the petition was filed. Thus, the petitioner has not established that she meets this criterion.

*A license to practice the profession or certification for a particular profession or occupation*

The record lacks evidence relating to this criterion.

*Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability*

The record lacks evidence of the petitioner's remuneration for performing, such as pay statements or Forms W-2 Wage and Tax Statements. The record also lacks evidence of comparable remuneration in the field. Thus, the petitioner has not established that she meets this criterion.

*Evidence of membership in professional associations*

The record contains no evidence relating to this criterion.

*Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations*

The petitioner submitted newspaper reviews of her performances in local newspapers. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) does not include recognition by the media. The record also contains several letters from experts in the petitioner's field. Letters prepared in support of the petition are not the type of formal recognition independent of the preparation of the petition contemplated by this criterion.

While several references claim that the petitioner won first prize at the King's Young Artists Competition, the record lacks a copy of this award. The petitioner submitted a certificate from the New England Conservatory honoring the petitioner with the 1997 Youth Philharmonic Orchestra Award. In addition, several references affirm that the petitioner's quartet won a prize at the Banff International String Quartet Competition. [redacted] Designate at the Toronto Symphony Orchestra, asserts that the "finalists at this competition are generally regarded as among the finest rank of musicians." The petitioner submitted the program for the finals of the 7th Banff

International String Quartet Competition in 2001. The petitioner's quartet is listed as a finalist, but the record lacks evidence that the petitioner actually won a prize at this competition or, if she did, which prize. We note that the prizes include first through fourth place (ranging from $20,000 down to $8,000), as well as the $2,000 Pièce de concert Prize and the $3,000 Székely Prize.

Finally, [redacted] Senior Director and Artistic Advisor at Carnegie Hall, asserts that the petitioner's quartet performed at Isaac Stern's last workshop in 2001 and that Mr. [redacted] "personally selected them to return to Carnegie Hall to perform in a debut chamber music series the following season." Ms. [redacted] further asserts that in 2002 the petitioner's quartet played the Weill Recital Hall at Carnegie Hall at the Isaac Stern Remembrance Concert.

Given the above evidence in the aggregate, we are satisfied that the petitioner meets this criterion. For the reasons discussed above, however, the petitioner has not submitted evidence relating to any of the other criteria. Thus, she has not demonstrated that she meets the requisite three regulatory criteria. We acknowledge that the regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides that if the above standards do not readily apply to the petitioner's occupation, she may submit comparable evidence to establish her eligibility. Counsel, however, has not explained how the remaining evidence is comparable to any of the above criteria. We note that subjective letters praising the petitioner's skill are not comparable to the type of objective evidence required by the regulatory criteria set forth at 8 C.F.R. § 204.5(3)(ii).

As the petitioner has not demonstrated that she is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*NYSDOT,* 22 I&N Dec. at 217-18, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, music. [redacted] Chair of the Department of Music at the State University of New York, Plattsburgh, characterizes the proposed benefits of the petitioner's work as "bringing the arts directly to all segments of society, including the youth of America." The director concluded that the proposed benefits of petitioner's work would be national in scope. We cannot uphold that conclusion. While the petitioner submitted ample evidence that promotion of the arts is in the national interest, the petitioner has not established that the impact of a single violinist will be more than negligible at the national level. *See NYSDOT,* 22 I&N Dec. at 217 n.3 (while pro bono legal services, education and nutrition are in the national interest, the impact of a single lawyer, teacher or cook is so attenuated at the national level as to be negligible.)

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra element of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submitted letters from experts in the field and evidence that she has performed at some prestigious venues but mostly at local events that have received local press coverage. Initially and in response to the director's request for additional evidence, counsel relies on a non-precedent decision by this office for the proposition that "statements from nationally or internationally known celebrities must be taken into consideration since the very reason such people are famous in the first place is that 'they are among the best at what they do and as such they have earned some degree of deference when offering detailed statements that pertain directly to their area of expertise.'" While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, a single sentence taken out of context from a non-precedent decision for which the record is not before us is not persuasive.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of skill and talent are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through her reputation and who have been influenced by her work are the most persuasive.

None of the letters in this matter explain how the petitioner has influenced the field of classical music. For example, Ms. [redacted] simply recounts the petitioner's training and performance history and names musicians with whom the petitioner has performed, concluding that this experience "distinguishes her as a rare talent in classical music." Most of the other letters are similar, with some including near identical language. While Ms. [redacted] asserts that she invited the petitioner to perform at SUNY, Plattsburgh based on the petitioner's reputation, this assertion does not establish that the petitioner is known outside of the New York area. While we acknowledge that the petitioner need not demonstrate notoriety on the scale of national acclaim, the national interest waiver contemplates that the petitioner's influence be national in scope. *NYSDOT,* 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor. *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

While the petitioner is no doubt a talented strings player, it can be argued that any musician capable of making a living in her field performs, at least on occasion, in respected venues. It does not follow

that every musician who has performed at a respected venue and secures letters from experts in her field inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As discussed above, the petitioner has not established that she is eligible for the classification sought, aliens of exceptional ability pursuant to section 203(b)(2) of the Act. Even if the petitioner had established that she was an alien of exceptional ability as defined at 8 C.F.R. § 204.5(k)(2),(3)(ii), it is clear from a plain reading of the statute that it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.